



Submission by

The Employers and Manufacturers Association

to the

Medical Council of New Zealand

on the

Consultation on medical certification

June 2023



About the EMA

The EMA has a membership of more than 7500 businesses, from Taupō north, employing around 300,000 New Zealanders.

The EMA provides its members with employment relations advice from industry specialists, a training centre with more than 600 courses and a wide variety of conferences and events to help businesses grow.

The membership covers all industry sectors and all business sizes. The EMA (N) has a duty to our members to keep them informed on what changes are being planned that will both positively and negatively alter the way they manage their business. We are actively encouraging our members to be more proactive in this space to enable them to mitigate the slow and unrelenting changes that are unfolding.

The EMA also advocates on behalf of its members to bring change in areas that can make a difference to the day-to-day operation of our members, such as RMA reform, infrastructure development, employment law, skills and education and export growth.

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Thank you for the opportunity to make a submission regarding guidance on issuing Medical Certificates.

The Medical Council of New Zealand is reviewing its 2013 statement on Medical Certification, which outlines the responsibilities of doctors when they complete a certificate.

The practice of medical certification comes with responsibilities and obligations. The Guidance document correctly identifies the Medical Certificates as legal documents. However, we note there is no review process to discuss or challenge the content of, use of, and duration of medical Certificates.

Employers work in a very strict and regulated environment. The key pieces of workplace legislation are the Employment Relations Act (ERA), the Holidays Act, Human Rights Act, Privacy Act the Health and Safety at Work Act and the ACC regime. While these are all separate pieces of legislation, in reality, they are linked. This means that issues under one Act can and are often managed under another piece of legislation. E.g., a safety breach is managed under HR and the Employment Relations Act (ERA), long term absence from work due to an ACC claim will also be managed under the ERA.

From one of our legal team that often must deal with illness-based absence:

The Medical Council, through its 2013 statement, outlines the standards doctors must follow when completing a medical certificate. The statement notes that the certificate may be used by the Health Practitioner's Disciplinary Tribunal, the Council and the Health and Disability Commissioner as a standard by which their conduct is measured. It also notes that a certificate may also be challenged in a New Zealand Court and the doctor may be called upon to justify their decisions.

As an employer, the request and evaluation of a medical certificate is challenging territory. Where the rights, interests and objectives differ between doctors, patients, and the receiving employer, it can create conflict and disagreement. Conflicts could arise when employers have doubts about the genuineness of an employee's illness. An employer is entitled to request a medical certificate even for just one day away, provided they pay for it. If an employee is away for three consecutive days (including weekends) an employer can require them to provide a medical certificate at their own expense. Employers have expressed concern to the EMA about the ease of obtaining these certificates. This situation is often not assisted by the lack of information provided on current medical certificates, which leads some employers to demand that further explanations be provided. Unhappily for employers in this situation, they are required to accept the medical certificate at its face value unless it is fraudulent or fake. In other words, if the doctor says the employee is sick and cannot attend work, that is generally the end of it.

It is the experience of EMA legal that the current certification does not reflect members' interests when wishing to proactively manage their employees or the impact of ACC's Experience Rating. Furthermore, the current accountability and/or enforceability of a practitioner to abide by the guidelines set by the Medical Council (or ACC for that matter) when presenting a medical certificate is nil.

The proposed new draft is intended to outline the responsibilities of doctors when they complete a certificate. The Medical Council statement is often referred to by employers and other authorities, so the Medical Council's aim is to devise guidance that is clear and informative for these users, as well as for doctors.

While the draft statement contains similar guidance to the current statement, the Medical Council has added important guidance on 'Disclosing a diagnosis,' 'Backdating a medical certificate,' and 'Fitness to drive,' and attempted to make it easier to navigate. Whilst these are welcomed, the accountability that is sought from a medical certificate has not improved beyond notifying the Medical Council or the Health and Disability Commissioner should an employer have concerns that a doctor has not complied with the requirements of the statement.

Of note is that the last time the Health Practitioners Disciplinary Tribunal took disciplinary action against a medical practitioner for false medical certifications was as far back as 2015.

Doctors are the patient advocate, and this is supported, however, we believe the advocacy is more than just the short-term immediate issue. Doctors are best placed to get behind the issues that employees may have and to that end, advocacy must be for medium to long-term benefits for the patient. Given employers play a significant role in the employees' life we believe doctors should involve employers in assisting with the patient's recovery at work and where indicated the resolution of any possible workplace issues identified by the employee.

There is no question regarding the rights of employees utilising their entitlement to use their sick leave. What does become problematic is when this use becomes repetitive and in some cases for long durations. This practice places huge strains on business.

Employees under their employment agreement have agreed to offer their contracted hours of work for an agreed set of payments. When one party, the employee, provides less working time then the contract is under stress. Repeated and long-term time off under a medical certificate is an example of putting the employment contract under stress.

Doctors must appreciate that they are practising in a continuum and that whatever they do for their patients does have downstream effects for both the patient and the receiving agency.

We **recommend** that doctors where indicated, consult and communicate with employers to offer the best patient-focused recovery at work programmes for illnesses managed under medical certificates.

See attached for specific questions and comments.



27 April 2023

Consultation – Medical certification

Issuing medical certificates can be a challenging part of medical practice. Along with obligations to the patient and meeting legal requirements, doctors also have responsibilities to a receiving agency such as an employer or an insurer. Where the rights, interests and objectives differ between doctors, patients and the receiving agency, it can create conflict and disagreement.

Our draft statement on *medical certification* is intended to outline the responsibilities of doctors when they complete a certificate. Our statement is often referred to by employers and other authorities. We aim to devise guidance that is clear and informative for these users, as well as for doctors.

While the draft statement contains similar guidance to the current statement, we have added new sections on 'Disclosing a diagnosis,' 'Backdating a medical certificate,' and 'Fitness to drive,' and attempted to make it easier to navigate. We welcome your input on our draft statement.

- You will find the [proposed draft statement on Medical certification](#) [here](#).
- The existing statement (September 2013) is available [here](#).

Key points at the outset of the statement

We have added a summary box at the beginning of the statement which contains the following key points:

- Medical certificates are legal documents required for a variety of purposes including employment, insurance, death certification, court proceedings, or fitness to engage in a particular activity e.g. driving. They are often used by the receiving agency to guide the ongoing management of your patient.
- A range of factors beyond the underlying medical condition can influence your assessment of the patient and your decision to issue a medical certificate. You need to be aware of these influences and how they affect your decision-making processes.
- If you decide to issue a medical certificate, you should do so in a timely and accurate manner. Ensure that you distinguish between what the patient tells you and your clinical assessment of the patient.
- In most situations, doctors are bound by a duty of confidentiality to their patients. If a receiving agency seeks more information, you should discuss with your patient what information they give you permission to disclose, before providing it to the receiving agency.

1. Do these key points provide an accurate overview of the statement? What changes (if any) should we make to the key points?

The EMA agrees with the provisions as outlined, however, would **recommend** the following.

1. Stronger wording around the consequence of repeated and long-term sick leave with regard to employment tenure is recommended. Doctors do sit within the employer's and employees' working continuum and therefore Doctors must be cognisant of the effects of repeated use of Med certs on the employee's job security. This is not to indicate nor suggest this is a prime consideration but rather a factor to be discussed with the patient.
2. Medical certification should at a minimum indicate the likely duration of the illness so that employers can prepare or mitigate the absence.
3. Employees will often request sick leave to delay disciplinary/performance meetings at work. The use of sick leave for this only makes matters worse as the workplace issue will remain unresolved.

Professional obligations when issuing a medical certificate.

We outline six pointers to guide doctors to complete medical certificates accurately. Each pointer is accompanied by a commentary. These pointers are:

- (1) Be aware that a medical certificate has implications beyond the patient.
- (2) Your statements should be accurate, truthful, and based on objective information.
- (3) Be aware of factors that can influence you when issuing a medical certificate.
- (4) Complete medical certificates in a timely manner
- (5) Gain permission from your patient before disclosing information to a receiving agency.
- (6) Do not complete a medical certificate for yourself or someone close to you.

2. Are there any changes we should make to 'Professional obligations when issuing a medical certificate'?

- EMA **recommends** that the term "stress leave" is discontinued as there is no such condition as stress. We would prefer a more medical diagnostic term with indications as to what at work may be causing or contributing to such a condition. This then enables employers to investigate and make specific changes we needed.
- Again, identifying an indicative duration of such conditions or changes at work that employers may consider would also be very helpful. Employers recognise that raising these issues at work can be difficult for some workers and some workplaces. Having an independent 3rd party identifying contributing factors is helpful.
- Med certs should also identify what other duties could be undertaken rather than a blanket "not fit for work". It is well recognised that remaining at work assists in patient recovery.
- Employers often receive Med Certs from doctors stating the patient "told me" or the patient requests sick leave. While this is part of normal day-to-day life, we would recommend that doctors rely on their history taking and professional opinions rather than solely from the patient.

What to include in a medical certificate

We have expanded the section previously headed 'Content of certificates' in the September 2013 statement. In line with queries, we regularly receive about medical certificates, we have included two sub-sections:

- Disclosing a diagnosis
- Backdating a medical certificate

3. Is the guidance in 'What to include in a medical certificate' clear, appropriate, and practical? What changes (if any) should we make?

- **EMA recommends:**
- Requiring doctors to use a definitive diagnosis is very helpful. It will limit the use of vague nondescript terms that are extremely unhelpful to employers and indeed employees, e.g., unwell off 3 days, especially in the well-being area.
- Doctors could link any diagnosis of illness with possible or employee-suggested factors at work would be helpful.
- Suggested time off or duration of the illness.
- Suggested other duties that could be undertaken or restricted working times.
- An invitation to contact the doctor (with patient consent) to discuss further recovery at work options that could be available at work.

Situations where you may be asked to issue a medical certificate.

This section lists some common situations where doctors may be asked to issue a medical certificate. While the content is similar to the September 2013 statement, we have:

- discussed 'Illness or injury' as a separate section and highlighted the need for doctors to consider what type of tasks and activities the patient can safely perform.
- added a new section on 'Fitness to drive,' and summarised several key points from Waka Kotahi/New Zealand Transport Agency's guidance on assessing a patient's fitness to drive.
- included more explanation about a 'mental disorder' that could result in a doctor being asked to conduct an assessment.
- included more explanation about a 'Medical certificate of Cause of Death' and the key role doctors have in providing accurate and complete information about the underlying cause of death.
- emphasised the need to be culturally safe and respectful in approach and communication when preparing any documents related to a person's death.

4. Is the guidance in 'Situations where you may be asked to issue a medical certificate' informative and workable? What changes (if any) should we make?

Nil response

If someone who is not your patient requests a medical certificate

We have added a section to guide doctors where a medical certification is requested by someone who is not their patient but who has a close relationship with the patient. Where that person has not been examined or assessed, we suggest providing a supporting statement about that person's circumstances instead of issuing a medical certificate.

5. In your view, is it appropriate for doctors to issue a supporting statement for someone close to the patient when that person is not a patient?

Nil response

If you are a member of the public

6. Does the draft statement meet your needs as a patient, employer, insurer, or other agency? What changes (if any) should we make to improve our guidance on medical certificates?

- See comments above.

Any other feedback

7. Please provide any other comments you may have about *Medical Certification* that you would like us to consider.

- The EMA **recommends** that work be done to align Medical Certificates with the ACC 45. Employers receive many ACC 45s and find them easy to read, informative and helpful.
- We suggest that a proforma Med Cert be mandated to have consistency and reliability for both patients and receiving agencies.
- We suggest that a formal “disputes process” be considered to allow employers to challenge the provisions of the Med Cert (not the diagnosis) regarding time off or restrictions. Given they are legal documents then some legal redress should be provisioned.
- A common concern from employers is the lack of response from doctors when specific issues or concerns have been raised concerning the details within the Med Cert. Given they are considered legal documents doctors must abide by the trust placed in them by receiving agencies and make timely and respectful responses to any issues raised by the receiving agency.

Consultation process

Your input and feedback are important to us. We invite you to review the draft statement and give us your views on our proposed changes. Please use the online form provided. Alternatively, you can email your submission to consultation@mcnz.org.nz.

The consultation closes on **6 June 2023**.